

HON. JAMAL N. WHITEHEAD

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOHN ELLIOTT, RICARDO CAMARGO,
JAVIER ROVIRA, and BRADLEY SMITH,

Plaintiffs,

v.

VALVE CORPORATION,

Defendant.

Case No. 2:24-cv-01218-JNW

IN RE VALVE ANTITRUST LITIGATION
(CASE NO. 2:21-CV-00563-JNW)
CONSUMER PLAINTIFFS’
OPPOSITION TO PLAINTIFFS’
MOTION TO APPOINT HAGENS
BERMAN SOBOL SHAPIRO LLP AND
BUCHER LAW PLLC AS INTERIM CO-
LEAD CLASS COUNSEL

NOTE ON MOTION CALENDAR:
October 23, 2024

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I. INTRODUCTION

Nearly four years ago, on January 28, 2021, Vorys, Sater, Seymour and Pease LLP (“Vorys”) filed the first putative class action on behalf of consumers alleging that Valve Corporation (“Valve”) was violating antitrust laws by monopolizing the market for personal computer game distribution through anticompetitive pricing practices. Just over two months ago, Hagens Berman Sobol Shapiro LLP and Bucher Law PLLC (“Hagens and Bucher”) filed suit on behalf of a putative class of consumers alleging these same claims against the same defendant. Not only do Hagens and Bucher include the same claims in their 2024 complaint that Vorys (and co-counsel) included in 2021 (in both Vorys’ original and amended complaints), in many instances they use the exact same words. In bringing this action, Hagens and Bucher piggybacked off of years of investigation, discovery, and litigation that Vorys initiated. This behavior does not serve the best interests of the class or justify an appointment for them as interim lead class counsel, particularly when Vorys, the firm that spent the time and resources laying the groundwork to bring this class action, is seeking appointment as interim lead class counsel in the first-filed action.

As an interested party, the consumer plaintiffs in *In re Valve Antitrust Litigation* (Case No. 2:21-cv-00563-JNW) (“Consumer Plaintiffs”) respectfully request that this Court deny Plaintiffs’ Motion to Appoint Hagens and Bucher as Interim Co-Lead Class Counsel.

II. STATEMENT OF FACTS

Almost four years ago, Vorys filed suit on behalf of five named plaintiffs and all others similarly situated pursuing the same claims that Hagens and Bucher now allege. *Sean Colvin et al. v. Valve Corp. et al.* (Case No. 2:21-cv-00801 C.D. Cal.), ECF No. 1; *Elliott et al.*, ECF No. 2 at 1 (“Plaintiffs in each case allege that Valve has used anticompetitive pricing and other restraints to unlawfully monopolize the market for [personal computer] game distribution.”); (Declaration of Kenneth J. Rubin (“Rubin Decl.”), attached hereto as Exhibit A, ¶ 3). Through subsequent transfers and consolidations, the *Colvin* litigation is now pending as *In re Valve Antitrust Litigation* (Case No. 2:21-cv-00563-JNW). *Colvin et al.*, ECF No. 36; *In re Valve Antitrust Litigation*, ECF

Nos. 29, 90; (Rubin Decl. ¶ 4).¹ Vorys moved for appointment as interim lead class counsel for consumers in that case following more than three years of work litigating the same antitrust claims against Valve at issue here. *In re Valve Antitrust Litigation*, ECF No. 373; (Rubin Decl. ¶ 7).

On August 9, 2024, Hagens and Bucher filed suit on behalf of John Elliott, Ricardo Camargo, Javier Rovira, and Bradley Smith (the “*Elliott* Plaintiffs”) pursuing antitrust claims against Valve for charging inflated prices and controlling the market through its platform most-favored-nations policy (“PMFN”). ECF No. 1. Hagens and Bucher moved for appointment as interim co-lead class counsel approximately two months later. ECF No. 25.

III. LAW AND ARGUMENT

As set forth in Consumer Plaintiffs’ Notice of Motion to Consolidate (ECF No. 30), this Court should consolidate the *Elliott* case with the first-filed case asserting consumer claims against Valve in *In re Valve Antitrust Litigation*, and appoint Vorys as lead counsel for consumer claims in that first filed case. Hagens and Bucher’s copycat effort to be named lead counsel for such claims should not be countenanced.

Federal Rule of Civil Procedure 23 allows this Court to “designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.” Fed. R. Civ. P. 23(g)(3). To decide whether an applicant should be selected as class counsel, courts evaluate “(i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel’s experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel’s knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class.” Fed. R. Civ. P. 23(g)(1)(A); *In re Amazon Return Pol’y Litig.*, No. 2:23-cv-1372, 2024 U.S. Dist. LEXIS 30916, at *5 (W.D. Wash.

¹ When this Court stayed the Consumer Plaintiffs’ claims in *In re Valve Antitrust Litigation* on October 25, 2021, the operative consumer complaint was found at ECF No. 34. (Rubin Decl. ¶ 10.) The fact that the putative developer class in that case subsequently amended their complaint without consumer claims—indeed, given the stay of the consumer claims, any amendment *could not* include those claims—does not change the fact that, when this Court lifts the stay of the consumers’ claims, there will be an operative complaint with live consumer claims.

1 Feb. 22, 2024).

2 The first factor—“the work counsel has done in identifying or investigating potential
3 claims in the action”—is of great importance and can be dispositive, particularly in cases when all
4 lead counsel applicants satisfy the other Rule 23(g)(1)(A) factors. *In re Amazon Return Pol’y*
5 *Litig.*, 2024 U.S. Dist. LEXIS 30916, at *7. Courts also view initiative favorably and appoint firms
6 that are first to identify claims, conduct independent investigations, and file complaints as interim
7 lead class counsel. *See, e.g., In re Interest Rate Swaps Antitrust Litig.*, Nos. 16-MD-2704 (PAE),
8 16-MC-2704 (PAE), 2016 U.S. Dist. LEXIS 101959, at *27–28 (S.D.N.Y. Aug. 3, 2016).

9 Additionally, Hagens and Bucher should not be permitted to try and improve their chances
10 of a leadership bid by manufacturing a speculative conflict. A speculative conflict does not prevent
11 a law firm from serving as interim lead class counsel. *Pfaff v. Washington*, No. 07-5280RJB, 2007
12 U.S. Dist. LEXIS 90257, at *15–16 (W.D. Wash. Nov. 27, 2007); *see also Cummings v. Connell*,
13 316 F.3d 886, 896 (9th Cir. 2003).

14 **A. Vorys developed and filed the first antitrust action against Valve on behalf of**
15 **consumers.**

16 Hagens and Bucher argue that this Court should appoint them as interim co-lead class
17 counsel in the *Elliott* case because they filed a distinct action and put a lot of time into their case.
18 For the reasons below, these arguments are belied by reality.

19 **1. The *Elliott* case is not distinct from the consumer class claims against**
20 **Valve filed first by Vorys in *In re Valve Antitrust Litigation*.**

21 Hagens and Bucher contend that this Court should “divide plaintiffs into two putative
22 classes and appoint interim lead counsel for each class” because this case and *In re Valve Antitrust*
23 *Litigation* involve “two distinct groups of plaintiffs.” ECF No. 25 at 4 (quoting *In re LIBOR-*
24 *Based Fin. Instruments Antitrust Litig.*, No. 11 MD 2262 (NRB), 2011 U.S. Dist. LEXIS 122735,
at *12–13 (S.D.N.Y. Oct. 18, 2011)).

25 To the extent the *Elliott* Plaintiffs argue they are distinct because they are the only class of
26 consumers challenging Valve’s platform most-favored-nations requirements, this allegation is

1 incorrect. ECF No. 25 at 6. From 2021 until the present, Vorys has represented a putative class
2 of consumers challenging Valve’s platform most-favored-nations policies. (Rubin Decl. ¶ 8.)
3 Vorys filed a complaint alleging these antitrust claims on January 28, 2021 (*Colvin et al. v. Valve*
4 *Corp. et al.*, Case No. 2:21-cv-00801 C.D. Cal.) and continuously represented the Consumer
5 Plaintiffs through the case’s transfer to the Western District of Washington, consolidation with the
6 *Wolfire* action, stay pending arbitration, and recently renewed litigation following Valve’s removal
7 of the mandatory arbitration clause in its subscriber agreement. *See Colvin et al.*, ECF Nos. 1, 36;
8 *In re Valve Antitrust Litigation*, ECF Nos. 29, 34, 66, 362, 370, 373; (Rubin Decl. ¶ 9).

9 To the extent the *Elliott* Plaintiffs argue they are distinct because they allege different
10 claims from the Consumer Plaintiffs, this assertion is also false. Hagens and Bucher acknowledge
11 as much in their Notice of Related Case—“Plaintiffs in each case assert claims under Sections 1
12 and 2 of the Sherman Act, as well as violations of Washington’s Consumer Protection Act” and
13 “Plaintiffs in each case allege that Valve has used anticompetitive pricing and other restraints to
14 unlawfully monopolize the market for PC game distribution.” ECF No. 2 at 1.

15 The *Elliott* Plaintiffs’ claims are duplicative of the Consumer Plaintiffs’ claims, so
16 consolidation is the appropriate procedure here. *See Abbott*, 2023 U.S. Dist. LEXIS 202954, at *4
17 (consolidating class actions involving “the same defendant and overlapping factual and legal issues
18 . . . [t]o promote judicial economy, ensure consistent results, and to streamline matters overall”).
19 Maintaining two separate class actions under these circumstances would result in two rounds of
20 discovery, motions, and trial for the same claims against the same defendant.

21 To the extent the *Elliott* Plaintiffs argue they are distinct because their class action is at a
22 different stage of litigation than the Consumer Plaintiffs’ case, this assertion is unpersuasive. First,
23 both the Consumer Plaintiffs and the *Elliott* Plaintiffs are in the pre-class certification stage,
24 making them well-suited for consolidation. (Rubin Decl. ¶ 11.) Second, Vorys counsel has been
25 heavily involved in discovery of Valve over the past two years and has extensive knowledge of
26 the facts relating to these claims. (*Id.* ¶ 13.) Given this familiarity, Vorys will not need to take

1 much if any additional discovery and is thus poised to reach the class certification and trial stages
 2 of litigation much faster than Hagens and Bucher can. (*Id.*) In this case, judicial economy favors
 3 consolidation, not separation.

4 **2. Hagens and Bucher piggybacked off of and used Vorys’ work to bring**
 5 **this action.**

6 A concerning amount of Hagens and Bucher’s Class Action Complaint repeats—word for
 7 word—allegations from the Consolidated Amended Class Action Complaint in *In re Valve*
 8 *Antitrust Litigation* authored by Vorys and co-counsel. (Rubin Decl. ¶ 12.) Exhibit A-1, attached
 9 to the Rubin Declaration, provides forty examples of the *Elliott* Complaint parroting the exact
 10 same language used in the *In re Valve Antitrust Litigation* Amended Complaint. (Rubin Decl. ¶
 11 12, Ex. A-1); compare *In re Antitrust Litigation*, ECF No. 34, with *Elliott et al.*, ECF No. 1.

12 Vorys, the firm that conducted an independent year-plus-long investigation and laid the
 13 groundwork for antitrust class actions against Valve, should be recognized for those efforts and
 14 appointed interim lead class counsel, not Hagens and Bucher, the firm that copied that work.
 15 *Granata v. Pratt & Whitney*, No. 3:21-CV-01657 (SVN), 2022 U.S. Dist. LEXIS 43347, at *19–
 16 20 (D. Conn. Mar. 11, 2022) (appointing counsel who were first to identify claims and did not
 17 “piggyback[] on an existing government investigation” as interim class counsel); *In re Interest*
 18 *Rate Swaps Antitrust Litig.*, 2016 U.S. Dist. LEXIS 101959, at *27–28 (appointing counsel
 19 because they undertook an “independent investigation” and “catalyzed the filing of the later
 20 actions”); (Rubin Decl. ¶ 14).

21 To say that Vorys’ work catalyzed the filing of the *Elliott* action is an understatement. In
 22 an affidavit submitted to the Supreme Court of the State of New York, Mr. Bucher attached a
 23 June 6, 2022 “Mass Arbitration Slide Deck,” which “contemplated bringing a mass arbitration
 24 against Valve for their anti-competitive pricing restraints.” *Zaiger LLC v. Bucher L. PLLC*, No.
 25 15124/2023 (N.Y. Sup. Ct.), William Bucher May 9, 2023, Affidavit, attached as Exhibit A-2 to
 26 Rubin Decl. (Rubin Decl. ¶ 16, Ex. A-2.) The Mass Arbitration Slide Deck—prepared nearly a

1 year and a half after Vorys filed the *Colvin* action—explained Bucher’s plan for a “passive approach” to “[m]onitor court dockets for motions to compel class actions to arbitration, *and copycat existing legal theories* with potentially better advertising approach.” *Id.* (emphasis added). The already pending Valve litigation was the exemplar candidate for this copycat approach. *Id.*

B. Vorys has spent substantially more time and resources litigating the merits of the claims against Valve than Hagens and Bucher have for the *Elliott* Plaintiffs.

“The work counsel has done in identifying or investigating potential claims in the action” is an important, and can be a dispositive, component of the interim lead class counsel analysis. Fed. R. Civ. P. 23(g)(1)(A)(i); *In re Amazon Return Pol’y Litig.*, 2024 U.S. Dist. LEXIS 30916, at *7. Vorys has done more work investigating and litigating the merits of the antitrust claims and proving Valve’s anticompetitive conduct than Hagens and Bucher. (Rubin Decl. ¶ 17.) This work demonstrates Vorys’ preparation and commitment to the class members and the case. *See In re Amazon Return Pol’y Litig.*, 2024 U.S. Dist. LEXIS 30916, at *7 (appointing counsel who “spent substantially more time and resources advancing the interests of the class” and filed the first case because it demonstrates their “preparation and commitment to prosecuting the case”); *In re Clearview AI, Inc.*, No. 21 C 0135, 2021 U.S. Dist. LEXIS 44262, at *2–3 (N.D. Ill. Mar. 10, 2021) (appointing counsel who “has taken the lead in aggressively moving this litigation forward” and filed the first of the multidistrict cases); *In re Interest Rate Swaps Antitrust Litig.*, 2016 U.S. Dist. LEXIS 101959, at *27–29 (appointing counsel who filed the first class action complaint after “undertaking an independent investigation,” which involved interviewing witnesses and experts); *Michelle v. Arctic Zero, Inc.*, No. 12cv2063-GPC(NLS), 2013 U.S. Dist. LEXIS 30229, at *12–13 (S.D. Cal. Mar. 1, 2013) (appointing counsel who “conducted more research and investigation in developing the case”).

The direct comparisons speak for themselves. Vorys began working on developing these consumer antitrust claims against Valve in 2019, whereas Bucher Law PLLC began doing so in early 2023—by copying Vorys’ work. *Compare* (Rubin Decl. ¶¶ 12, 18), *with* ECF No. 27 ¶ 2.

Vorys filed its complaint on January 28, 2021, whereas Hagens and Bucher filed theirs on August 9, 2024. *Compare Colvin et al.*, ECF No. 1, with ECF No. 25 at 9. Vorys attorneys have spent more than 6,000 hours litigating antitrust claims against Valve, whereas Bucher Law attorneys claim they have spent more than 4,000 hours doing so.² *Compare* (Rubin Decl. ¶ 19), with ECF No. 27 ¶ 5.

Other aspects of Vorys’ work are incomparable. For example, Vorys started a factual investigation into Valve’s business practices on the Steam platform around August 2019. (Rubin Decl. ¶ 20.) During this investigatory period, Vorys spoke with several economists and retained a well-credentialed economist specializing in these issues to vet the economic theories at play. (*Id.*) Additionally, Vorys attorneys spent over 1,000 hours reviewing and coding the more than 2.5 million documents produced by Valve in *In re Valve Antitrust Litigation*. (*Id.* ¶ 21.) Vorys took four depositions in *In re Valve Antitrust Litigation* and assisted lead interim class counsel for the developers extensively with the depositions and reports of two experts. (*Id.* ¶ 22.)

Hagens and Bucher argue their “extensive work in filing individual arbitration demands and the consumer class action against Valve” justifies their appointment as interim class counsel. ECF No. 25 at 5. But Vorys has done work actually investigating and then litigating the merits of the antitrust claims and proving Valve’s anticompetitive conduct. (Rubin Decl. ¶ 17.) Thus, Hagens and Bucher’s argument, taken to its logical end, supports appointing Vorys as interim lead class counsel instead.

C. Vorys does not have a conflict preventing it from serving as interim lead class counsel.

² Although Mr. Bucher asserts in his declaration that “Bucher Law PLLC attorneys have spent more than 4,000 hours litigating these antitrust cases against Valve Corporation,” 4,000 hours have not elapsed since Hagens and Bucher filed their complaint on August 9, 2024. ECF No. 27 ¶ 5. Thus, this number likely encompasses Hagens and Bucher’s work marketing to consumers and arbitrating claims against Valve, none of which involves obtaining discovery from Valve. By contrast, Vorys’ 6,000 hours stem solely from its work in investigating and developing the class litigation against Valve, and then prosecuting those claims in litigation, which all works to the benefit of Consumer Plaintiffs’ claims. (Rubin Decl. ¶ 19.)

Vorys does not have an “irreconcilable conflict”—as Hagens and Bucher characterize it—preventing it from serving as lead counsel. ECF 25 at 9. This allegation is speculative at best, and Hagens and Bucher cite no case law to support it.³ *See id.* at 6–7, 8–9. Courts refrain from disqualifying counsel based on speculative or trivial conflicts, like the one alleged here. *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 942 (9th Cir. 2015) (“Only conflicts that are fundamental to the suit and that go to the heart of the litigation prevent a plaintiff from meeting the Rule 23(a)(4) adequacy requirement.”); *Cummings*, 316 F.3d at 896 (speculative damages are insufficient to create an adequacy of representation concern).

Plaintiffs for both sides of a two-sided platform have a unity of interests, not a conflict. *Ohio v. Am. Express Co.*, 585 U.S. 529, 544–47 (2018) (“*Amex*”) (concluding that it is necessary to establish anticompetitive effects on the “two-sided market . . . as a whole” to demonstrate anticompetitive harm by a two-sided transaction platform, so merely showing effects on one side of the platform is insufficient to carry the plaintiffs’ burden) (emphasis added). Vorys’ role as lead counsel in the consumer case and an executive committee member in the developer case does not create a conflict. (Rubin Decl. ¶ 23.) Instead, it makes Vorys uniquely qualified to prove anticompetitive effects on both sides of the Steam platform, as *Amex* requires. (*Id.*)

While the law is unsettled in this Circuit, the Second Circuit has found that neither side of a platform—here, consumers and developers—can keep the entire overcharged damages amount against a two-sided platform, so they need to follow a damages model allocating some portion of the overcharges to the other “side” of the platform. *See US Airways, Inc. v. Sabre Holdings Corp.*, 938 F.3d 43, 59 (2d Cir. 2019). Vorys and lead interim class counsel’s expert for the putative developer class has created a damages model that analyzes how to calculate total damages on both

³ Instead, Hagens and Bucher cite to previous arguments made by counsel in *In re Valve Antitrust Litigation*. ECF No. 25 at 9. But this Court permitted Vorys to serve as an Executive Committee member for the developers in *In re Valve Antitrust Litigation* while representing Consumer Plaintiffs. *In re Valve Antitrust Litigation*, ECF No. 92. In fact, the counsel whose arguments Hagens and Bucher rely on ultimately became part of this leadership structure. *Id.*

1 sides of the Valve platform while avoiding duplicative damages or inconsistent theories. (Rubin
2 Decl. ¶ 24.)

3 Even if a conflict exists between the consumers and developers, it is not a fundamental one
4 preventing Vorys from serving as interim lead class counsel. *See Pfaff*, 2007 U.S. Dist. LEXIS
5 90257, at *15–16 (appointing interim class counsel despite allegations of a damages conflict
6 between members of the class because “[t]he potential conflicts raised by [competing] counsel are
7 speculative and do not warrant separate counsel at this time”); *Melville v. Hop Energy, LLC*, Nos.
8 21-cv-10406, 23-cv-7318, 2024 U.S. Dist. LEXIS 89469, at *7–8 (S.D.N.Y. May 17, 2024)
9 (appointing interim class counsel despite allegations of a damages conflict because “Defendant
10 present[ed] little evidence of an actual conflict, beyond the fact that both cases involve recovery
11 from the same Defendant”); *cf. Soc. Servs. Union, Local 535, etc. v. Cnty. of Santa Clara*, 609
12 F.2d 944, 948 (9th. Cir. 1979) (“Mere speculation as to conflicts that may develop at the remedy
13 stage is insufficient to support denial of initial class certification⁴.”). Hagens and Bucher have
14 done little more than sling a conclusory conflict allegation at Vorys—one unsupported by law and
15 insufficient to bar Vorys from serving as interim lead class counsel.

16 IV. CONCLUSION

17 For the reasons discussed above, the *In re Valve Antitrust Litigation* Consumer Plaintiffs
18 respectfully request that this Court deny Plaintiffs’ Motion to Appoint Hagens Berman Sobol
19 Shapiro LLP and Bucher Law PLLC as Interim Co-Lead Class Counsel.

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21 DATED: October 17, 2024.

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26 ⁴ Indeed, in the developer part of the case, Vorys is the executive committee member working with
and under the direction of four lead interim class counsel firms. (Rubin Decl. ¶ 6.)

Respectfully submitted,

ROMERO PARK PS

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⁵ Kenneth Rubin, Timothy McGranor, Douglas Matthews, Kara Mundy, and Thomas McCormick are admitted pro hac vice in *In re Valve Antitrust Litigation* (Case No. 2:21-cv-00563-JNW).

CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all CM/ECF recipients.

DATED: October 17, 2024.

/s/ H. Troy Romero
H. Troy Romero, WSBA #19044

LCR 7 CERTIFICATION

I certify that this memorandum contains 3,282 words, in compliance with the Local Civil Rules.

DATED: October 17, 2024.

/s/ H. Troy Romero
H. Troy Romero, WSBA #19044